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# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 73-62

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HUBERT WHEELER, et al.,  
*Petitioners,*

vs.

ANNA BARRERA, et al.,  
*Respondents.*

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## **RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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### **STATEMENT**

Respondents do not accept Petitioners' statement of the questions presented or statement of the case.

The real issue is whether the petitioners will cease to deprive educationally deprived nonpublic school children enrolled in nonpublic schools of the equitable educational benefits they are entitled to under Title I of the Elementary and Secondary Education Act of 1965. 20 U.S.C. §241a et seq. (Hereinafter referred to as Title I, ESEA.) The issue is not a constitutional one. It is not a matter of statutory construction. Simply, the real issue is whether the petitioners will comply with the intent of Congress as expressed in the Elementary and Secondary Education Act and the criteria of the United States Commissioner of Education as set forth in his regulations and guidelines.

Respondents are educationally deprived children attending a predominantly Negro and a predominantly Mexican-American nonpublic school in the inner city of Kansas City, Missouri. They are eligible beneficiaries under Title I, ESEA. They have been denied by petitioners the benefits to which they are entitled under Title I.

The intent of Congress in enacting Title I, ESEA, was to meet the needs of all educationally deprived children in low-income areas, regardless of where they went to school. In the words of the Eighth Circuit Court of Appeals:

"The Act made it the strict responsibility of the local educational agency to plan and administer programs that would meet the particularized needs of all educationally disadvantaged children. Thus, the undisputed purpose of Title I was to benefit the educationally deprived child whether attending a public or nonpublic school." (Appendix A, page A5).

The vast majority of Title I, ESEA services involve personnel. In the fiscal year 1971, over 77% of Title I expenditures in Missouri were for personnel, over 67% were for instructional personnel alone (Appendix in the Eighth Circuit Court of Appeals, Volume I, pages 55 and 56). There are only two basic ways of providing personnel services during regular school hours to Title I children attending nonpublic schools. The first is by dual enrollment; that is, allowing the nonpublic school child to go on a part-time basis to the public school for Title I services. The second is by bringing the services to the child, that is, by allowing the Title I teacher to provide services on nonpublic school premises or by sending a mobile teaching unit with teachers to the nonpublic school (See: USOE Handbook, page 11, Defendants' Exhibit No. 5).

The Missouri State Board of Education has perennially directed that children enrolled in nonpublic schools must not participate in Title I benefits rendered by educational personnel during regular school hours. This position of the Missouri State Board prohibits dual enrollment and so effectively eliminates children enrolled in nonpublic schools from any participation in some seventy percent (70%) of all Title I opportunities. According to a survey made by the United States Office of Education at the request of the Court of Appeals, the Missouri State Board is the only state educational agency in the nation that prohibits both the teacher from going to the pupil and the pupil from going to the teacher.

Petitioners have offered to approve programs conducted after regular school hours for nonpublic school children. All witnesses in this case agree that after-hour programs are inferior to programs conducted during regular school hours. Hubert Wheeler, former State Commissioner of Education, testified by Deposition (Appendix, Eighth Circuit Court of Appeals, Volume II, pages 87 and 88):

"Q. Would it be a disadvantage to provide Title I services after regular school hours?"

"A. A disadvantage."

"Q. Yes sir."

"A. There may be a few that are performed after school hours, but it would be a disadvantage to provide all of Title I after school hours, yes."

"Q. Would it be a disadvantage to provide Title I on Saturdays?"

"A. If you can get it any other days, it certainly would."

"Q. How about during the summer, if you could get it during the school year?"

"A. Thinking of my own sixteen year old daughter, I would a lot rather they would get it in the nine months' time than to have to go in the summer time, too. Everyone would feel the same way, I think. They are entitled to go during the day and get it. If they could get it during the week, it would be best."

Edward Downey, Title I Director for the Kansas City Public School District, testified (Appendix, Eighth Circuit Court of Appeals, Volume III, page 43):

"A. It is most difficult for special services to be provided without personnel as is evidenced by the non-public school or, pardon me, public school making use of such personnel to carry out an effective program."

After extensive cross-examination, Mr. Downey reiterated (page 59), "In my judgment, the provision of personnel would be advantageous." When asked if an after-hour program could be made comparable by spending an equal amount of money as spent on public school programs during the regular hours, he stated (page 80), "It would be comparable in dollar amount spent, in my judgment, it would not be comparable as far as . . . educationally most appropriate."

The record in this case shows gross inequities in the extension of Title I, ESEA benefits insofar as nonpublic school educationally deprived children in Missouri are concerned. A representative sample of actual Title I, ESEA programs was introduced into evidence. The sample included two metropolitan, a suburban and a rural school district. Although ESEA does not require an exact per capital expenditure for each and every child eligible for benefits under Title I, per capita expenditure is a significant means of measuring whether or not the program provides an equitable service. The following table com-

per capita expenditures in these four representative school districts.

School District	Expenditure per public school child	Expenditure per private school child
Berkley	\$210	\$85
Linn	\$244	\$30
Kansas City	\$250	\$25
St. Louis	\$242	\$10

Respondents sought a preliminary injunction in the trial court seeking to enjoin petitioners from continuing to approve Title I programs with such grossly inequitable per pupil expenditures. Petitioners admitted that if the injunction were granted, it would be necessary for them to re-allocate between \$5 and \$6 million (Appendix, Eighth Circuit Court of Appeals, Volume III, page 29).

The District Court found that there were inequitable expenditures of Title I, ESEA funds between Title I children in public and nonpublic schools, but was of the opinion that if equal funds were spent in after-hour programs, the services would be equitable. Thus, the District Court did not grant respondents relief (Petition for Certiorari, Appendix B, page A41).

The Eighth Circuit Court of Appeals found that it was not a comparable program to provide after-hour services to needy private school children while offering the same services during regular school hours to deprived public school pupils (Petition for Certiorari, Appendix A, page A15). The majority opinion stated (page A16):

"Once the need of all qualified students is determined, the state or local educational agency must then show some reasonable justification, within the defined purposes of the regulations and the Act, for denying com-

parable services to eligible private school pupils. No showing has been made here."

The Court of Appeals reversed and remanded.

**PETITIONERS' APPLICATION FOR WRIT OF  
CERTIORARI SHOULD BE DENIED FOR  
THE FOLLOWING REASONS:**

**1. Courts are not in conflict.**

The decision of the Eighth Circuit Court of Appeals in this case is not in conflict with the decision of any other United States Court of Appeals.

**2. There is no conflict with state law.**

The Eighth Circuit Court of Appeals did not decide an important question of law in conflict with any applicable state law.

In stating the questions presented and in argument, petitioners have asserted that the decision of the Eighth Circuit is contrary to state law. This assertion is simply untrue.

While there is no statute of Missouri or any decision of a Missouri state court bearing directly on these issues, the Petitioners seem to rely on the opinion in *Special School District v. Wheeler*, Mo., 408 S.W. 2d 60, in maintaining that state law forbids sending educational personnel, employed by public agencies under Title I, ESEA, onto nonpublic school premises to render Title I services. In the *Special District* case, the Supreme Court of Missouri merely held that teachers, paid out of the state public school fund, could not be sent to perform educational services on nonpublic school premises. The decision rests on

the finding that such use of the public school fund was not permitted, I.c. 63. The decision does not even apply to other state funds, and certainly has no relevancy to the use of Federal funds. Title I, ESEA is 100% federally funded. The Attorney General of Missouri, in issuing an official opinion, took into consideration the *Special District* case and ruled that public school personnel, paid with federal funds, pursuant to Title I, ESEA, may be made available on the premises of nonpublic schools to provide special services to eligible children and that this did not violate Missouri law (Petition for Certiorari, Appendix A, page A20).

The Missouri State Constitution also expressly provides as follows (Petition for Certiorari, Appendix A, page A24):

"Money or property may also be received from the United States and be distributed together with public money of this State, for any public purpose designated by the United States. Missouri Constitution, Article III, Section 38 (a)."

Even the District Court found that the question had never been passed on by a Missouri Court (Petition for Certiorari, Appendix B, page A42).

The decision of the Eighth Circuit is not in conflict with Missouri law.

**3. This case does not present an important federal question.**

At the request of the Eighth Circuit Court of Appeals, a survey was made of all 50 states as to the manner of participation of nonpublic school children in regular school hour programs. The survey demonstrated that the Missouri State Board of Education was the only state educational agency in the nation that prohibits both the teacher

from going to the pupil and the pupil from going to the teacher. Many states allow both dual enrollment and the providing of Title I services by Title I personnel on non-public school premises. Thus, the practical effect of this case appears to be only on the State of Missouri and the practices of its State Board of Education.

The mere fact that this case involves the application of a federal statute does not per se create "an important question of federal law."

**4. The decision of the Eighth Circuit Court of Appeals does not conflict with applicable decisions of this Court.**

The decision of the Eighth Circuit Court of Appeals is consistent with the decisions of this court in such cases as *Lemon v. Kurtzman*, 403 U.S. 602, *Earley v. DiCenso*, 403 U.S. 602, and *Sanders v. Johnson*, 403 U.S. 955.

In *Lemon, supra*, this court approved the provision of "secular, neutral, or non-ideological services, facilities or materials" (page 616). Such services, supplied in common to all students, have been considered by this Court as not to offend the Establishment Clause. The services offered under Title I, ESEA, are special services only, and do not include general education. They are offered in common to all educationally deprived children. They are the type of services that this Court referred to in *Lemon*.

Title I, ESEA clearly meets the secular purpose and effect test. Religious instruction or activities are expressly prohibited, e.g. 45 C.F.R. Section 116.53(e). No one contends that anything other than secular services will be offered.

Under Title I, ESEA there is no "excessive entanglement" between government and religion. All property

and personnel are wholly under the control of public agencies. 45 C.F.R. Sections 116.19(e) and 116.20; 20 U.S.C. Section 241(e)(a)(3). In *Lemon*, *DiCenso*, and *Sanders*, personnel were employed by and under the control of the nonpublic school. No Title I funds go to or through any nonpublic school in any way. In *Lemon* and *Sanders*, nonpublic schools received direct payments of public funds. In *DiCenso*, nonpublic school teachers received direct payments. Because nonpublic schools do not in any way have contact with public funds under Title I, there is no requirement that they submit to audits or accountings to public agencies. All funds are administered by a public agency and must be accounted for by that public agency. This is not any different when personnel is provided on nonpublic school premises. In *Lemon* and the other cases, nonpublic schools were required to account for public funds which they received, and also to open their records for audit.

No surveillance is required of a nonpublic school or nonpublic school personnel under Title I, ESEA. In *Lemon* and the other cases, this Court concluded that because personnel were under the control of a church agency, surveillance to maintain secularity would be required. Personnel under Title I are employed by the public school district and under its administrative direction and control. 45 C.F.R. Section 116.19(e).

The absence of any real constitutional question is emphasized by the recent decisions of *Committee for Public Education v. Nyquist*, 93 S.Ct. 2955 (June 25, 1973), and *Sloan v. Lemon*, 93 S.Ct. 2982 (June 25, 1973). In these cases the Court considered statutory schemes to provide tuition grants, income tax benefits, and tuition reimbursement payments for parents of children in nonpublic schools. Substantially all of the nonpublic schools

were religious schools, so the principal beneficiary of the statutes would be the religious schools. These statutes were deemed unconstitutional, and the reason for the holding was that the statutes were designed with the principal effect of aiding religion. *Committee for Public Education, supra*, *Sloan, supra*, 93 S.Ct. 2969, 2971, 2972, 2976, 2986, 2987, 2988.

The principles stated in Title I, ESEA are far different. Title I, ESEA is designed to meet the educational needs of *all* educationally deprived children, with no class distinctions, and with the clearly stated purpose of "meeting the special educational needs of educationally deprived children." 20 U.S.C. 241a, *Barrera v. Wheeler*, 475 F. 2d 1333, 1341, 1342. Since the purpose of Title I, ESEA is *not* designed to benefit a comparatively small sectarian class *nor* to benefit a religion, it must be said that Title I, ESEA and the decision of the Court of Appeals is consistent with the directions of court as stated in *Committee for Public Education, supra*, and *Sloan, supra*. Indeed, these recent cases again affirm the propriety of furnishing bus transportation and secular textbooks. 93 S.Ct. 2966, 2986.

In *Nebraska State Board of Education v. School District of Hartington*, 409 U.S. 921, this Court denied a petition for writ of certiorari. In that case, a Title I, ESEA program was conducted in premises leased from a nonpublic school. Both public and nonpublic school children attended the Title I programs during regular school hours. The Supreme Court of Nebraska upheld the legality of the program stating, "It would seem that to deny students the right to participate in a program offered by a public school district solely because that student is enrolled in a parochial school, would violate the students' right to a free exercise of religion and equal protection of

the law." *School District of Hartington v. Nebraska State Board of Education*, Nebr., 195 N.W. 2d 161, 164.

In an opinion supporting the denial of the petition for certiorari in the case, Justice Brennan noted that there was not the slightest suggestion that this was a subterfuge to make a subsidy to the parochial school. He further noted that the remedial reading and remedial math courses offered under that Title I program would operate completely independent of the curriculum and of the Catholic school administration. In his words, the Title I program was "poles apart" from the situation in *Sanders*, *Lemon*, and *DiCenso*. He concluded, "The accommodation involved in this case would not trespass beyond permissible bounds." *Nebraska State Board of Education v. School District of Hartington*, 409 U.S. 921, 926.

The *Hartington* decision supports the fact that the decision of the Eighth Circuit Court of Appeals in this case was not in conflict with applicable decisions of this Court and that the petition for certiorari should be denied.

"It is precisely because a denial of a petition for certiorari without more has no significance as a ruling, that an explicit statement of the reason for denial means what it says." *Parker v. Ellis*, 362 U.S. 574, 576.

**5. The Court of Appeals did not depart from the accepted and usual course of judicial proceedings.**

**6. Certiorari before judgment is not warranted.**

This is a petition for writ of certiorari to the Eighth Circuit Court of Appeals. On June 6, 1973, petitioners filed a notice of appeal to the Eighth Circuit Court of Appeals in this same case. That appeal has not been disposed of and is currently pending before the Eighth Circuit Court

of Appeals. Petitioners invoke jurisdiction under 28 U.S.C. §2101(e) (Petition for Certiorari, page 2).

Pursuant to Rule 20 of this Court, certiorari should not be granted unless there is a showing that this case is "of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." There is no such showing in this case.

**7. Petitioners do not have standing to raise the constitutional questions which are untimely asserted in their petition for certiorari.**

The responsibility of the petitioners is to review all Title I, ESEA applications from local educational agencies in the State of Missouri and only to approve such as are in compliance with the Act and the criteria established by the United States Commissioner of Education. 20 U.S.C. Section 241e. Petitioners have never pointed out any constitutional right or interest of theirs which is in conflict with the directions they have received from Congress and the United States Commissioner of Education. It is fundamental that the petitioners cannot challenge the constitutionality of the Act unless they are in some manner the victim of the unconstitutional element of which they complain. *Bode v. Barret*, 344 U.S. 583.

In *Columbus and Greenville Railway Company v. Miller*, 283 U.S. 96, this Court considered the question of the standing of the state officer to complain of a constitutional question. In resolving the issue against the state officer, the Court stated, l.c. 99:

"... while so far as state practice is concerned, the authority of a public officer to assail to the courts of the state a constitutional validity of a state statute is a

local question, this fact does not alter the fundamental principle, governing the determination of the federal question by this court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasion of personal or property rights or through the discrimination which the amendment forbids. The constitutional guarantee does not extend to the mere interest of an official as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

In *Tennessee Power Electric Company v. Tennessee Valley Authority*, 306 U.S. 118, the complainants contended that the statutory plan for the Tennessee Valley Authority Act was unconstitutional. And they further contended that their rights would be violated by the Tennessee Valley Authority acting pursuant to the statute. The Court held that any infringement or injury was too contingent and remote to give standing to attack the constitutionality of this statute, stating, *l.c.* 137:

"The appellants have invoked the doctrine that one threatened with direct and special injury by the act of an agent of the government which come up but for the statutory authority for its performance, would be in violation of his legal rights, may challenge the validity of the statute in the suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on the statute which infers a privilege."

Petitioners here have failed to make any showing by pleading, proof or argument that they are endowed with any interest which could possibly be adversely affected

by the fair and equitable enforcement of the Elementary and Secondary Education Act. In the absence of such showing, the petitioners may not complain of the constitutional validity of the statute.

Petitioners have not preserved and do not properly present any constitutional issue.

The petitioners now assert, "The constitutional issue is squarely before the court at this time." (Petition for Certiorari, page 14). This is the first time that petitioners have asserted that the constitutional issue is directly involved.

The District Court noted that the petitioners had carefully avoided the constitutional question in order that their access to federal money would not be jeopardized (Petition for Certiorari, Appendix B, page A44). The Court of Appeals recognized the fact that the constitutional question was not presented in such a way as to make it a real issue for the court, and they refused to pass on any constitutionality question on such an "abstract or hypothetical basis" (Petition for Certiorari, Appendix A, page A26).

Respondents submit that this court does not pass on issues which have not been decided in the lower courts. *Walters v. City of St. Louis*, 347 U.S. 231. This principle is particularly true of constitutional issues. A party relying on a constitutional issue must present it completely and properly to the trial court and intermediate courts before the issue can be determined in the Supreme Court. *Shelley v. Kramer*, 334 U.S. 1.

Since the constitutional issue, if any, was not pleaded and fully asserted in the lower court, petitioners cannot now be heard to complain of the constitutionality of the Elementary and Secondary Education Act.

## **CONCLUSION**

For the foregoing reasons, respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

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